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No. 16-111

In the Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD., ET AL., PETITIONERS

v.

COLORADO CIVIL RIGHTS COMMISSION, ET AL.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF COLORADO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether Colorado's public accommodations law, Colo. Rev. Stat. § 24-34-601(2)(a) (2016), violates the First Amendment as applied to an individual who declines to design and create custom wedding cakes for same-sex wedding celebrations that violate his sincerely held religious beliefs.

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INTEREST OF THE UNITED STATES

This case concerns the application of the First Amendment to a state statute that bars discrimination in places of public accommodation on the basis of several protected characteristics. The United States has a substantial interest in the preservation of constitutional rights of free expression. It also has a substantial interest in the application of such rights in the context of the state statute here, which shares certain features with federal public accommodations laws, including Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a *et seq.*, and Title III of the Americans with Disabilities Act of 1990, 42 U.S.C. 12181 *et seq.*

STATEMENT

1. The Colorado Anti-Discrimination Act, Colo. Rev. Stat. §§ 24-34-301 to 24-34-804 (2016), prohibits discrimination across a variety of contexts, including in places of public accommodation. As relevant here, the statute provides:

> It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.

Id. § 24-34-601(2)(a).

Colorado defines "place of public accommodation" broadly to include "any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public." Colo. Rev. Stat. § 24-34-601(1). The statute excludes churches, synagogues, mosques, and other places "principally used for religious purposes" from that definition. *Ibid.*

2. a. For nearly 25 years, petitioner Jack Phillips has owned and operated petitioner Masterpiece Cakeshop, Inc. (Masterpiece), a Colorado bakery that creates and sells custom cakes and other baked goods. Pet. App. 4a, 274a, 278a-280a. Phillips is a Christian who seeks to incorporate his religious principles into all facets of his business. *Id.* at 281a. To that end, for example, he closes Masterpiece on Sundays, refuses to sell goods containing alcohol, and chooses not to create or sell goods relating to Halloween. *Id.* at 281a-284a. Phillips also believes that he can honor God through the creative aspects of his business, including the design and creation of custom wedding cakes. See *id.* at 274a, 276a, 278a.

Phillips views the creation of custom wedding cakes as a form of art, to which he devotes his creativity and

artistic talents. Pet. App. 277a, 279a. To design a custom wedding cake, he first consults with his clients to learn about their personalities, preferences, and wedding celebration so that he can tailor a product for the specific couple and event. *Id.* at 278a-279a. Phillips next sketches a design of the cake on paper and works with the couple to develop a model that accommodates their desires. *Id.* at 279a. Alternatively, his clients may select one of the unique designs that Phillips previously created. *Ibid.* Phillips then bakes the cake, sculpts it into a particular design or shape if desired, creates and colors the frosting and decorations, assembles and decorates the cake, and delivers it to the site of the wedding celebration. *Id.* at 279a-280a. In some cases, he also interacts with people at the wedding itself. *Id.* at 280a.

As the designer and creator of the wedding cake, Phillips believes that he is an "important part of the wedding celebration for the couple" and is "associated with the event." Pet. App. 280a. He further believes that a wedding cake is a symbol conveying a message that a marriage has begun and should be celebrated. *Ibid.* Given that understanding of his work, Phillips will not design and create a custom wedding cake for a celebration of a union that conflicts with his religious beliefs. *Id.* at 287a-288a.[1] He believes that to create a wedding cake celebrating a marriage that directly contradicts his religious convictions would be "a personal endorsement and participation in [a] ceremony and relationship" that he does not condone. *Id.* at 288a (emphasis omitted). As relevant here, Phillips believes that

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[1] This brief uses the term "custom" to mean a cake created for a specific event and a specific client, as opposed to a baked good available for immediate purchase by the public.

the Bible teaches that God intends marriage to be between one man and one woman. *Id.* at 274a-276a. He therefore refuses to create custom wedding cakes for use in a same-sex wedding celebration. *Id.* at 284a-288a. He will, however, make any other cake or baked good for a same-sex couple. *Id.* at 288a.

b. In July 2012, respondents Charlie Craig and David Mullins visited Masterpiece and asked Phillips to "design and create a cake to celebrate their same-sex wedding." Pet. App. 4a. At the time, Colorado declined to recognize either same-sex marriages or same-sex civil unions, so the couple planned to marry in Massachusetts and later host a wedding reception in Colorado. *Id.* at 5a, 72a & n.4; Resp. Supp. App. 3a.

Craig and Mullins sat down with Phillips at Masterpiece's "cake consulting table" and told him that they wanted a cake for "our wedding." Pet. App. 64a. Phillips informed the couple that he does not create wedding cakes for same-sex weddings, but that he would make them any other type of cake or other baked good. *Id.* at 65a. Craig and Mullins immediately left the store. *Ibid.* The next day, Craig's mother called the bakery, and Phillips advised her that he does not create wedding cakes for same-sex weddings because of his religious beliefs and because Colorado did not recognize same-sex marriages. *Ibid.* Craig and Mullins eventually obtained a wedding cake with rainbow-colored layers from another bakery, which they used in their cake-cutting ceremony. See *id.* at 75a n.7, 289a-291a.

3. Craig and Mullins later filed charges of discrimination with the Colorado Civil Rights Division, alleging that petitioners had discriminated against them on the basis of their sexual orientation. Pet. App. 5a. Following an investigation, the Colorado Civil Rights Division

determined there was probable cause to believe that petitioners had violated the Colorado Anti-Discrimination Act. Resp. Supp. App. 1a-9a.

Craig and Mullins then filed a formal complaint with the Office of Administrative Courts. Pet. App. 5a-6a. In response, petitioners contended that they had not discriminated on the basis of sexual orientation and that applying Colorado's public accommodations law in this case would infringe on their constitutionally protected free-speech and free-exercise rights. *Id.* at 63a. The parties filed cross-motions for summary judgment. *Id.* at 64a.

An administrative law judge (ALJ) granted summary judgment in favor of Craig and Mullins. Pet. App. 64a. After concluding that a refusal to create a cake for a same-sex wedding constituted discrimination on the basis of sexual orientation under Colorado law, *id.* at 69a-71a, the ALJ dismissed petitioners' free-speech objections, *id.* at 73a-79a. He observed that Colorado could not constitutionally "compel an individual to communicate by word or deed an unwanted message or expression," *id.* at 74a, but concluded that no compelled expression was at issue here, *id.* at 75a-76a. The ALJ rejected petitioners' free-exercise objections as well. *Id.* at 79a-87a.

On appeal, respondent Colorado Civil Rights Commission adopted the ALJ's decision in full. Pet. App. 57a. It ordered petitioners to cease discriminating against Craig and Mullins or other same-sex couples "by refusing to sell them wedding cakes or any product [petitioners] would sell to heterosexual couples." *Ibid.* The order also instructed petitioners to implement several remedial measures, including "comprehensive staff training" and the submission of "quarterly compliance

reports" to the Colorado Civil Rights Commission for the next two years. *Id.* at 58a.

4. The Court of Appeals of Colorado affirmed the Colorado Civil Rights Commission's order. Pet. App. 1a-53a. It agreed with the ALJ that, under Colorado law, petitioners had discriminated against Craig and Mullins because of their sexual orientation. *Id.* at 13a-22a. It also rejected petitioners' argument that the Free Exercise Clause of the First Amendment barred the application of Colorado's public accommodations law in this case. *Id.* at 36a-50a.

As for the First Amendment's Free Speech Clause, the court of appeals began by defining the "compelled conduct in question" as "deci[ding] to serve a potential client" without regard to "the client's sexual orientation." Pet. App. 29a. In the court's view, that conduct was not "sufficiently expressive so as to trigger First Amendment protections." *Ibid.* Relying on this Court's decision in *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006), the court of appeals reasoned that petitioners would "not convey a message supporting same-sex marriages merely by abiding by the law and serving its customers equally." Pet. App. 30a. And to the extent that a wedding cake communicates such a message, the court believed that reasonable observers generally would not attribute that message to petitioners. *Id.* at 30a-34a. Although the court acknowledged "that a wedding cake, in some circumstances, may convey a particularized message celebrating same-sex marriage," *id.* at 34a, it determined that it did not need to reach the issue because Craig and Mullins had not requested a specific design or written message before leaving the store, *id.* at 35a. The court

concluded that "the compelled conduct here is not expressive" and that Colorado therefore "need not show that it has an important interest" in the enforcement of its public accommodations law. *Id.* at 36a.

5. The Colorado Supreme Court denied review. Pet. App. 54a-55a.

SUMMARY OF ARGUMENT

A. The application of Colorado's public accommodations law to petitioners implicates two strands of doctrine interpreting the Free Speech Clause of the First Amendment. On the one hand, this Court has repeatedly held that the "freedom of speech prohibits the government from telling people what they must say." *Agency for Int'l Dev.* v. *Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013) (citation omitted). On the other hand, the Court has made clear that content-neutral laws targeting conduct ordinarily do not violate the First Amendment. See *R. A. V.* v. *City of St. Paul*, 505 U.S. 377, 390 (1992).

Although those two First Amendment principles typically operate in separate spheres, they came into conflict in *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), and the Court unanimously reconciled them in favor of freedom of expression. In that case, the Court explained that public accommodations laws aimed at discriminatory conduct "are well within the State's usual power to enact." *Id.* at 572. But because the application of such a law to a parade would have altered "speech itself," the First Amendment prevented the law's enforcement. *Id.* at 572-573. *Hurley* illustrates that an application of a public accommodations law that fundamentally alters expression and interferes with an expressive event triggers heightened scrutiny, notwithstanding the law's

content-neutrality. In the view of the United States, a comparable First Amendment intrusion occurs where a public accommodations law compels someone to create expression for a particular person or entity and to participate, literally or figuratively, in a ceremony or other expressive event. Such application of a public accommodations law exacts as great a First Amendment toll as the application in *Hurley*.

B. The application of Colorado's public accommodations law to petitioners involves the requisite degree of compulsion. The law compels Phillips to design and create a custom wedding cake for a same-sex couple, if he would do the same for an opposite-sex couple. A custom wedding cake is a form of expression, whether pure speech or the product of expressive conduct. It is an artistic creation that is both subjectively intended and objectively perceived as a celebratory symbol of a marriage. In addition, the law compels Phillips to participate, through his creative expression, in an expressive event. Weddings are sacred rites in the religious realm and profoundly symbolic ceremonies in the secular one. And within the context of a celebration imbued with such meaning, the cake-cutting ceremony is itself an iconic ritual. When Phillips designs and creates a custom wedding cake for a specific couple and a specific wedding, he plays an active role in enabling that ritual, and he associates himself with the celebratory message conveyed.

Forcing Phillips to create expression for and participate in a ceremony that violates his sincerely held religious beliefs invades his First Amendment rights in a manner akin to the governmental intrusion in *Hurley*. Colorado has not offered, and could not reasonably offer, a sufficient justification for that compulsion here.

As a result, the First Amendment bars the application of Colorado's public accommodations law to petitioners.

ARGUMENT

THE FIRST AMENDMENT'S FREE SPEECH CLAUSE BARS THE APPLICATION OF COLORADO'S PUBLIC ACCOMMODATIONS LAW TO PETITIONERS IN THIS CASE

A. A Public Accommodations Law Receives Heightened Scrutiny Where It Compels Both Creation Of Expression And Participation In An Expressive Event

1. Public accommodations laws ordinarily do not require First Amendment scrutiny

This case involves two competing interests: an individual's right to speak or remain silent according to the dictates of his or her conscience, and the government's desire to combat discrimination in commercial transactions. Both interests are undeniably important. And both interests generally coexist without difficulty.

a. The First Amendment of the Constitution, applicable to the States under the Fourteenth Amendment, protects "the freedom of speech." U.S. Const. Amend. I. That "term necessarily compris[es] the decision of both what to say and what *not* to say." *Riley* v. *National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796-797 (1988). The Court thus has long held that it is "a basic First Amendment principle that 'freedom of speech prohibits the government from telling people what they must say.'" *Agency for Int'l Dev.* v. *Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013) (quoting *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006) (*FAIR*)). "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration,

and adherence." *Ibid.* (quoting *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 641 (1994)); see *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring) (explaining, in the free-exercise context, that the First Amendment protects the right "to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community").

The prohibition on content-based laws that compel expression protects against a variety of potential governmental intrusions. The government may not compel the dissemination of its own preferred message, whether through words or conduct. See *Wooley* v. *Maynard*, 430 U.S. 705 (1977) ("Live Free or Die" motto on state license plates); *West Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943) (salute to the American flag). Nor may it compel one private speaker to disseminate the message of another private speaker. See *Pacific Gas & Elec. Co.* v. *Public Utilities Comm'n*, 475 U.S. 1 (1986); *Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241 (1974). As the Court has explained, "[a] system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." *Maynard*, 430 U.S. at 714.

Just as the government may not compel the *dissemination* of expression, it equally may not compel the *creation* of expression. Compelling a creative process is no less an intrusion—and perhaps is a greater one—on the "individual freedom of mind" that the First Amendment protects. *Maynard*, 430 U.S. at 714 (citation omitted). Accordingly, the government may not enact content-based laws commanding a speaker to engage in protected expression: An artist cannot be forced to paint,

a musician cannot be forced to play, and a poet cannot be forced to write. See *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 569 (1995) (remarking that painting, music, and poetry are "unquestionably shielded" under the First Amendment); see also *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 602 (1998) (Souter, J., dissenting) ("It goes without saying that artistic expression lies within * * * First Amendment protection."). That freedom from compulsion "is powerful medicine in a society as diverse and populous as ours." *Cohen* v. *California*, 403 U.S. 15, 24 (1971). It puts "the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *Ibid.*

b. Meanwhile, federal and state governments have long employed facially content-neutral public accommodations laws to combat discrimination in commerce. "At common law, innkeepers, smiths, and others who made profession of a public employment, were prohibited from refusing, without good reason, to serve a customer." *Hurley*, 515 U.S. at 571 (citation and internal quotation marks omitted). But because the common-law duty to serve did not protect particular groups targeted for discrimination, many States acted "to counter discrimination by enacting detailed statutory schemes." *Romer* v. *Evans*, 517 U.S. 620, 628 (1996); see *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 259 & n.8 (1964) (noting that, by 1964, more than half of States had enacted public accommodations laws). Over time, States expanded their statutes to cover more

types of businesses and more groups that they concluded had been targeted for discrimination. See *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 656 & n.2 (2000).

Congress also enacted a federal public accommodations law as part of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241. Title II of the Civil Rights Act provides that "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin." 42 U.S.C. 2000a(a).[2] Shortly after Title II was enacted, the Court affirmed its constitutionality under Congress's Commerce Clause authority. See *Heart of Atlanta Motel*, 379 U.S. at 261-262. It explained that Title II prohibits discrimination in "enterprises having a direct and substantial relation to the interstate flow of goods and people," *id.* at 250-251, and that the legislative record before Congress was "replete with evidence of the burdens that discrimination by race or color places upon interstate commerce," *id.* at 252.

c. For the most part, individual First Amendment rights have coexisted comfortably with federal and state public accommodations laws. That is because those laws generally focus on preventing discriminatory

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[2] Colorado's public accommodations law, Colo. Rev. Stat. § 24-34-601, is broader than Title II in two relevant respects. First, the Colorado statute applies to more types of businesses than Title II, which does not cover the bakery at issue. See pp. 22-23, *infra*. Second, the Colorado statute treats sexual orientation as a protected class, see Colo. Rev. Stat. § 24-34-601(2)(a), whereas Title II covers only race, color, religion, and national origin, 42 U.S.C. 2000a(a).

conduct rather than modifying the content of expression. Under ordinary circumstances, content-neutral laws that regulate conduct rather than speech receive no First Amendment scrutiny, even where they have "incidental" effects on speech. *FAIR*, 547 U.S. at 62. Thus, "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Ibid.* (quoting *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)); see, *e.g.*, *Arcara* v. *Cloud Books, Inc.*, 478 U.S. 697, 705-706 (1986); *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

In circumstances where a content-neutral law directly restrains expressive conduct, however, the law is subject to limited First Amendment scrutiny. See *FAIR*, 547 U.S. at 65-66; *United States* v. *O'Brien*, 391 U.S. 367, 376-377 (1968). Under the *O'Brien* framework, a government regulation of expressive conduct is permissible so long as the regulation is "unrelated to the suppression of free expression," falls within the government's power to enact, advances a substantial governmental interest, and is no greater than necessary to further that interest. 391 U.S. at 377; see, *e.g.*, *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288 (1984) (upholding camping prohibition not targeted at demonstrators).

Public accommodations laws generally do not regulate the content of expression but rather the discriminatory provision of goods or services—an act that is not itself protected under the First Amendment's Free Speech Clause. See *R. A. V.* v. *City of St. Paul*, 505 U.S. 377, 390 (1992) ("Where the government does not target

conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy."). In the majority of their applications, then, public accommodations laws either do not trigger any First Amendment scrutiny or survive *O'Brien* scrutiny. To the extent that such laws have incidental effects on speech, "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 567 (2011). And to the extent that such laws restrict expressive conduct, they often do so for reasons that, consistent with *O'Brien*, are "unrelated to the suppression of free expression." 391 U.S. at 377. Therefore, most applications of a public accommodations statute fall "well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination." *Hurley*, 515 U.S. at 572.

2. A content-neutral law triggers heightened scrutiny where it compels both expression and participation in an expressive event

a. Although a content-neutral law aimed at conduct ordinarily receives limited (if any) First Amendment scrutiny, that is not so where an application of the law would fundamentally alter "speech itself." *Hurley*, 515 U.S. at 573. In that circumstance, the Court has subjected the law's application to heightened scrutiny rather than *O'Brien* scrutiny, even if the government's interest in regulation does not relate to the communicative nature of the expression. See *id.* at 575-577; *Dale*, 530 U.S. at 659.

In *Hurley*, this Court considered the application of a Massachusetts public accommodations law to an annual St. Patrick's Day parade organized by a private entity.

515 U.S. at 560-562. The Supreme Judicial Court of Massachusetts held that the organizers' exclusion of a group of gay, lesbian, and bisexual descendants of Irish immigrants from the parade constituted discrimination on account of sexual orientation and thus violated the state public accommodations law. *Id.* at 563-564. It also concluded that requiring the group's inclusion in the parade would have only an "incidental" effect on First Amendment rights. *Id.* at 563. This Court reversed. *Id.* at 581. It acknowledged that the law "does not, on its face, target speech or discriminate on the basis of its content, the focal point of its prohibition being rather on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds." *Id.* at 572. But the law had nevertheless been "applied in a peculiar way" to "essentially requir[e]" the parade organizers "to alter the expressive content of their parade." *Id.* at 572-573. The Court thus refused to apply the lower level of scrutiny generally applicable to content-neutral statutes that do not target speech. See *id.* at 577-580; see also *Dale*, 530 U.S. at 659 (noting that *Hurley* had "applied traditional First Amendment analysis").

In *Dale*, the Court reaffirmed *Hurley*'s approach in the context of an expressive association. The Court explained that the typical enforcement of a state public accommodations law "would not materially interfere with the ideas" that an expressive organization seeks to communicate. 530 U.S. at 657. If, however, the law "directly and immediately affects associational rights," heightened scrutiny is appropriate. *Id.* at 659. Accordingly, the Court concluded that the First Amendment barred the application of a public accommodations law to force

an expressive organization to admit members with divergent views. See *id.* at 648, 659. Together, *Hurley* and *Dale* distinguish an application of a content-neutral law that merely has an incidental effect on speech from one that fundamentally alters protected expression. In the latter situation, even a content-neutral regulation of conduct receives heightened scrutiny.

b. This Court did not establish in *Hurley* a comprehensive framework for evaluating when applying the nondiscrimination provision of a public accommodations law represents a sufficiently serious intrusion on expressive activity to merit heightened scrutiny. But at a minimum, heightened scrutiny applies where a law imposes the same type of First Amendment burden at issue in that decision. Thus, where an application of a law alters the "expressive content" of an expressive event, heightened scrutiny is appropriate. *Hurley*, 515 U.S. at 572-573. And because compelled speech is no less fundamental an interference than the direct alteration of speech, see *Agency for Int'l Dev.*, 133 S. Ct. at 2327, the same is true in that context: Heightened scrutiny is appropriate at least where a law both compels the creation, for a particular person or entity, of speech or of a product or performance that is inherently communicative, and compels the creator's participation in a ceremony or other expressive event.

i. The compelled creation of expression can mean the compelled creation of pure speech. Or it can mean the compelled performance of an expressive activity that is "sufficiently imbued with elements of communication" to constitute symbolic "speech." *Texas* v. *Johnson*, 491 U.S. 397, 404 (1989) (citation omitted). For example, in *Johnson* and in *Spence* v. *Washington*, 418 U.S.

405 (1974) (per curiam), the Court held that the desecration of an American flag in protest of various government policies was expressive conduct under the First Amendment. Conduct amounts to protected expression, the Court explained, if subjectively the actor "inten[ded] to convey" a message, and objectively "the likelihood was great that the message would be understood by those who viewed it." *Johnson*, 491 U.S. at 404 (citation omitted); see *FAIR*, 547 U.S. at 66 (explaining that expressive conduct must be "inherently expressive").

Public accommodations laws compel expression—whether speech or expressive conduct—when they mandate the creation of commissioned goods or the provision of commissioned services that are inherently communicative. That situation might arise if a public accommodations law were applied to painters, photographers, poets, actors, musicians, or other professional artists. Assuming that those artists offer their creative services to the public, a State might attempt to bar a painter who agrees to paint a custom portrait of an opposite-sex couple at their wedding from declining to paint a same-sex couple, or vice versa. Or it might attempt to bar a freelance graphic designer who agrees to design fliers for the upcoming meetings of a Jewish affinity group from declining to do so for a neo-Nazi group or the Westboro Baptist Church.[3] So long as the artist

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[3] Whether Colorado's public accommodations law protects such groups depends on how Colorado courts construe the term "creed," as used in Colo. Rev. Stat. § 24-34-601(2)(a). Regulations promulgated by the Colorado Civil Rights Commission give that term a broad meaning, encompassing "all aspects of religious beliefs, observances or practices, as well as sincerely-held moral and ethical beliefs," though not "political beliefs." Colo. Code Regs. § 708-1:10.2(H)

offers to produce expression for a fee, a public accommodations law might purport to restrict her ability to determine which art she will create and for whom.

Of course, public accommodations laws apply only if the painter or designer willingly creates expression for other members of the public in analogous circumstances. See Pet. App. 29a. But the fact that a person engages in some voluntary expression does not mean that the government may compel additional expression without First Amendment scrutiny. As the Court has explained, a statute cannot use protected expression to trigger an otherwise impermissible regulation of expression. See *Tornillo*, 418 U.S. at 256-258. For that reason, the Court in *Tornillo* held unconstitutional a state statute that required newspapers attacking a political candidate to afford the candidate equal space to reply. *Id.* at 258. It reasoned that linking the candidate's right-of-access to protected speech "exacts a penalty" on that protected speech. *Id.* at 256. The inevitable result is that protected speech will be chilled. See *id.* at 257; see also *Davis* v. *Federal Election Comm'n*, 554 U.S. 724, 739 (2008) (explaining that a "drag on First Amendment rights is not constitutional simply because it attaches as a consequence of a statutorily imposed choice").

Likewise, a requirement that a professional who offers to create custom expressive works for some events must also make them for other events will predictably dissuade some artists from offering their services for

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(2014). Other state and local public accommodations laws expressly cover political beliefs. See, *e.g.*, D.C. Code § 2-1402.31(a) (2016) ("political affiliation"); Madison, Wis., Mun. Code § 39.03(2) and (5) (2015) ("political beliefs"); Seattle, Wash., Mun. Code §§ 14.06.020(L), 14.06.030(B) (2017) ("political ideology").

hire. Some painters may decline to paint custom portraits, and some designers may decline to design custom fliers. Faced with the prospect of governmental compulsion, those would-be speakers "might well conclude that the safe course is to avoid controversy." *Tornillo*, 418 U.S. at 257. Indeed, petitioners themselves report that they have stopped creating custom wedding cakes in light of the Colorado Civil Rights Commission's order. Pet. Br. 28.

ii. A public accommodations law exacts a greater First Amendment toll if it also compels participation in a ceremony or other expressive event. That participation may be literal, as in the case of a wedding photographer who attends and is actively involved with the wedding itself. Or that participation may be figurative, as when a person designs and crafts a custom-made wedding ring that performs an important expressive function in the ceremony. Either way, such forced participation intensifies the degree of governmental intrusion.

The Court's decisions in *Hurley* and *Dale* illustrate the First Amendment harms from that sort of unwanted association. In each case, a state public accommodations law would have forced an expressive group or event to permit certain individuals or entities to participate. The Court rejected that result, explaining that the government may not compel an unwilling expressive group or event to admit speakers at odds with its message. See *Hurley*, 515 U.S. at 572-575; *Dale*, 530 U.S. at 655-656. The converse is also true: The government may not compel an unwilling speaker to *join* a group or event at odds with his religious or moral beliefs. Either version of governmental compulsion violates the fundamental "principle of autonomy to control one's own

speech." *Hurley*, 515 U.S. at 574; cf. *Lee* v. *Weisman*, 505 U.S. 577, 592 (1992) (describing the government's "duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people").

Whether governmental compulsion creates an association with an unwanted message depends on a reasonable observer's perception of the relevant expression. In circumstances in which two speakers' messages are intertwined, the risk of mistaken attribution is clear. For example, the Court applied heightened scrutiny in *Dale*, as the mandatory inclusion of a gay Boy Scout leader would have "force[d] the organization to send a message * * * [to] the world." 530 U.S. at 653; see *Hurley*, 515 U.S. at 575 (reasoning that group's participation in a parade "would likely be perceived as having resulted from" a determination "that its message was worthy of presentation and quite possibly of support as well"). By contrast, the Court held in *FAIR* that a statute guaranteeing military recruiters access to law school campuses did not raise First Amendment concerns. 547 U.S. at 63-65. The Court observed that "[n]othing about recruiting suggests that law schools agree with any speech by recruiters," and that even "high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so." *Id.* at 65; see *PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74, 87 (1980) (noting that "[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition * * * will not likely be identified with those of the owner [of a shopping center]").

That same inquiry applies where a public accommodations law effectively compels an individual or entity to participate in an expressive event. If, for example, a

hotel is forced to provide a table and chairs—or, as in *FAIR*, a room—it acts as a mere conduit to effectuate another's expression. As a result, provision of that good or service does not suggest to a reasonable observer that the provider supports the ceremony or event at which the good or service is used. The opposite, however, is true of a musician hired to perform a love song at a wedding ceremony. His personalized contribution would reasonably be perceived as a signal that, at a minimum, he does not oppose the marriage. After all, he offers his service at the wedding itself; he blends his artistic vision with any guidance that the couple has offered; and he creates the expression for use solely at this particular ceremony, channeling his creativity to that specific objective.

3. Few potential applications of public accommodations laws compel protected expression

Under the analysis described above, public accommodations laws will be subject to heightened scrutiny in only a narrow set of applications. Most commercial transactions will fail to satisfy the threshold requirement that the product or service be inherently communicative. And even expressive products or services will rarely involve the degree of custom work necessary to suggest either compelled creation or active participation in an expressive event.

a. Most businesses, even those that provide services related to expressive events such as weddings, cannot show that they engage in protected expression. Thus, a commercial banquet hall may not refuse to rent its facilities, nor may a car service refuse to provide limousines, nor may a hotel refuse to offer rooms, nor may an event service refuse to rent chairs. Such products or services—a hall, a limousine, a hotel room, or a chair—

are not inherently communicative. Even if those vendors subjectively believe that they are communicating a message about their clients' marriage, there is not a substantial likelihood "that the message would be understood by those who viewed it." *Johnson*, 491 U.S. at 404 (quoting *Spence*, 418 U.S. at 411).

b. For those businesses that create inherently expressive products, public accommodations laws may permissibly require them to conduct transactions involving pre-made or off-the-shelf products. In that situation, the law does not "significantly affect [the business's] expression." *Dale*, 530 U.S. at 656. After all, the business has already chosen to speak: The painting has already been painted or the photograph already taken. The law merely regulates the sale of the good. Moreover, the sale of a pre-made item does not intimately involve its creator in an expressive event at which that item appears. Where the product has already been made and is available for sale to anyone who enters the door, as opposed to a product custom-made for a particular client and a particular event, the creator would not reasonably be perceived as an active participant in and sponsor of any subsequent use of the product. The transaction therefore lacks both compelled expression and compelled participation.

c. Finally, not every public accommodations law covers the sort of artistic or commissioned-product businesses that may present First Amendment challenges. Colorado's public accommodations law regulates, among other things, "any business offering wholesale or retail sales to the public." Colo. Rev. Stat. § 24-34-601(1). But not all such statutes sweep so broadly. In particular, Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a—the primary federal law proscribing discrimination in

places of public accommodation—does not ordinarily govern businesses that engage in commissioned expression. Rather, it regulates places of lodging, restaurants that sell food for consumption on the premises, and places of entertainment. 42 U.S.C. 2000a(b)(1)-(3). Public accommodations laws come into contact with the First Amendment primarily when States apply their laws beyond "clearly commercial entities, such as restaurants, bars, and hotels." *Dale*, 530 U.S. at 657.

B. As Applied To Petitioners In This Case, Colorado's Public Accommodations Law Is Subject To, And Fails To Satisfy, Heightened First Amendment Scrutiny

Under the analysis set forth above, Colorado's public accommodations law violates the First Amendment, as applied to the unique circumstances of this case. The application of that law to petitioners triggers heightened scrutiny because it effectively compels them both to create expression and to participate in an expressive event. And Colorado cannot satisfy such scrutiny because it lacks a sufficient state interest to justify that intrusion on "the core principle of speaker's autonomy." *Hurley*, 515 U.S. at 575.

1. The application of Colorado's public accommodations law to petitioners triggers heightened scrutiny

This case falls within the small set of applications of content-neutral laws that merit heightened scrutiny. First, Colorado's law requires Phillips to design and create a custom wedding cake that is inherently communicative, if he does so for other patrons. Second, the law forces Phillips to participate, through his inherently communicative creation, in an important ritual at a wedding celebration—a profoundly expressive, and often religious or sacred, event.

a. A custom wedding cake can be sufficiently artistic to qualify as pure speech, akin to a sculptural centerpiece. With Phillips, for example, the functional task of baking is only one component of a larger artistic process: He consults with his clients, sketches the cake design or utilizes a prior one, bakes the cake, sculpts it into a particular shape if necessary, creates and colors the frosting and decorations, and assembles and decorates the cake. Pet. App. 279a-280a; cf. *Brown* v. *Entertainment Merchs. Ass'n*, 564 U.S. 786, 790 (2011) (determining that video games constitute protected speech because they contain "familiar literary devices," along with "features distinctive to the medium"). Thus, just as a painter does more than simply apply paint to a canvas, a baker of a custom wedding cake does more than simply mix together eggs, flour, and sugar: Both apply their artistic talents and viewpoints to the endeavor.

Like other creative efforts, a custom wedding cake may also contain features that are unquestionably speech. It might include an inscription such as "God blesses this marriage," Pet. Reply Br. 7; an image such as a couple embracing in front of a cross, Pet. App. 302a; or a symbol such as the rainbow-colored layers in the cake that Craig and Mullins used at their wedding celebration, *id.* at 75a n.7, 289a-290a.[4] In short, a custom

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[4] Although the court of appeals did not consider any specific design on this record, see Pet. App. 34a-35a, it appears that Colorado law would require Phillips, in some circumstances, to decorate a cake with particular words or symbols that he finds objectionable. To be sure, the court suggested that Phillips could permissibly decline to inscribe a message that he would not write on any cake—*e.g.*, "God blesses same-sex marriages." See *id.* at 20a n.8 (noting that a bakery may refuse service based on the "nature of the requested message"). But if Phillips would write the message on an opposite-sex couple's cake—*e.g.*, "God blesses this marriage"—then

wedding cake is not an ordinary baked good; its function is more communicative and artistic than utilitarian. See Carol Mcd. Wallace, *All Dressed in White: The Irresistible Rise of the American Wedding* 61 (2004) (detailing the wedding cake's evolution from a "festive dessert" to a "showpiece"). Indeed, Masterpiece's logo is an artist's paint palate with both a paintbrush and a whisk. Pet. App. 277a.

Even if a custom wedding cake is not pure speech, Phillips's act of designing and creating the cake is at least expressive conduct. That act involves both a subjective intent to convey a message and a significant likelihood that the message will be understood by those who view the final product. See *Johnson*, 491 U.S. at 404. Here, Phillips avers that "[a] wedding cake communicates that a wedding has occurred, a marriage has begun, and the couple should be celebrated," Pet. App. 280a, and that to create a wedding cake for Craig and Mullins would have constituted "a personal endorsement" of their marriage, *id.* at 288a (emphasis omitted). Under the circumstances of this case, that is sufficient to satisfy the subjective component.

The objective component is satisfied as well. Wedding cakes are iconic symbols that serve as the centerpiece of a ritual in which the married couple cuts the cake in front of their guests, marking the celebratory start to their marriage. See, *e.g.*, Simon R. Charsley, *Wedding Cakes and Cultural History* 116-117 (1992) (Charsley); Pet. App. 289a-290a. Given that symbolic role, many couples commission bakers to design and

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the Colorado Civil Rights Commission's order, which the court of appeals affirmed, requires him to do the same for a same-sex couple. See *id.* at 57a (requiring petitioners to provide "any product [they] would sell to heterosexual couples").

create custom wedding cakes for a substantial sum. See Glenn Collins, *Extravagant Wedding Cakes Rise Again*, N.Y. Times, June 6, 2014, at ST14 (Collins) (reporting the growing cost of American wedding cakes, with some priced as high as $30,000). A reasonable observer who views a custom wedding cake could fairly infer that its creator at least does not oppose his clients' marriage, just as a reasonable observer of a statue memorializing a military victory could fairly infer that its sculptor at least was not a pacifist.

b. Colorado's public accommodations law not only requires Phillips to create expression, but also compels him to participate through his creation in a ceremony that is deeply expressive in both religious and secular traditions. This Court has described marriage as a union of "transcendent importance," "sacred to those who live by their religions" and providing "unique fulfillment to those who find meaning in the secular realm." *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2594 (2015). A wedding celebration, which marks the beginning of that union, is imbued with expression. "Wedding ceremonies convey important messages about the couple, their beliefs, and their relationship to each other and to their community," with "[t]he core of the message" being "a celebration of marriage and the uniting of two people in a committed long-term relationship." *Kaahumanu* v. *Hawaii*, 682 F.3d 789, 799 (9th Cir. 2012).

Weddings convey that message through verbal utterances such as vows and through a variety of symbolic rituals. See *Kaahumanu*, 682 F.3d at 799 (collecting examples). For example, a "wedding ring"—like the "wedding ceremony" itself—"serves as a symbol * * * of something profoundly important." *Perry* v. *Brown*,

671 F.3d 1052, 1078 (9th Cir. 2012), vacated and remanded *sub nom. Hollingsworth* v. *Perry*, 133 S. Ct. 2652 (2013). Typically, a couple exchanges these symbols in a ritual that signifies and celebrates their commitment to each other. Given that context, a jewelry designer who creates custom wedding rings for a couple could be fairly characterized as an active participant in the wedding celebration, as he creates and enables a key symbolic element of the ceremony.

A custom wedding cake is similarly significant. "Since antiquity, weddings customarily have been celebrated with a special cake." Carol Wilson, *Wedding Cake: A Slice of History*, 5 Gastronomica: The J. of Critical Food Stud. 69, 69 (Spring 2005). Although the wedding cake appears at a celebratory reception rather than at the formal ceremony, it remains an iconic symbol of the overall wedding celebration. According to one sociologist, "the wedding cake is possibly the ultimate sacrament" for "our secular culture." Collins ST14. Like wedding rings, and unlike most other products present at a wedding, a wedding cake is used in a ritual that signifies and celebrates the beginning of a marriage—namely, the ceremony in which the newlyweds cut the cake together and sometimes feed it to each other. This cake-cutting ceremony has "become one of the clearest and most essential rites of marrying" in modern times, and "also one of the most potentially meaningful." Charsley 116-117. By completing "their first joint task in life," the couple marks and celebrates the beginning of their marriage. *Id.* at 117. Craig and Mullins's wedding celebration was no exception: Photographs of their cake-cutting ceremony capture the

celebratory, cooperative nature of the ritual. See Pet. App. 289a-290a.[5]

By producing a custom wedding cake for that ritual, Phillips participates in the wedding celebration in a meaningful way. Even though he may not always remain physically present at the wedding, he crafts and delivers his creative expression to the event. See Pet. App. 280a. And his handiwork enables—indeed, plays a central role in—a uniquely expressive ritual. See Simon Charsley, *Interpretation and Custom: The Case of the Wedding Cake*, 22 Man 93, 98 (1987) ("A whole series of events expected in the context of a wedding would be impossible without [the wedding cake]: an essential photograph, the cutting, the toast, and the distribution of both cake and favours at the wedding and afterwards."). In that sense, Colorado's public accommodations law compels Phillips not just to create expression but also to participate in a wedding celebration that conflicts with his sincerely held religious beliefs.

c. In finding that Colorado's public accommodations law did not compel expression, the court of appeals relied heavily on this Court's decision in *FAIR*. See Pet.

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[5] Consistent with the recognizable nature of the cake-cutting ceremony, some courts have observed that the ritual occurred in the course of evaluating whether a marriage existed between two people. See, *e.g.*, *Garrison* v. *Garrison*, 460 A.2d 945, 946 (Conn. 1983) ("Following the formal ceremony, the parties had a reception which included the traditional cutting of a wedding cake."); *Ramlakan* v. *Kawall*, No. A-2451-13T2, 2016 WL 2859456, at *1 (N.J. Super. Ct. App. Div. May 17, 2016) (per curiam) ("Plaintiff introduced a copy of the wedding invitation and photographs of * * * the parties cutting a large wedding cake."); *Black* v. *Hall*, No. 94113, 2010 WL 3814586, at *4 (Ohio Ct. App. Sept. 30, 2010) ("Photographs of the couple's wedding reception were introduced that showed them ceremonially cutting and sharing wedding cake and dancing.").

App. 30a-32a. It concluded that, "[a]s in *FAIR*, * * * it is unlikely that the public would view [petitioners'] creation of a cake for a same-sex wedding celebration as an endorsement of that conduct." *Id.* at 31a. The court's analogy was misguided. In *FAIR*, a federal statute required that law schools afford equal access to military and nonmilitary recruiters, if the institution received certain federal funds. 547 U.S. at 51. The Court held that such equal treatment did not send any message indicating the school's agreement with military policies. There was a clear distinction "between speech a school sponsors and speech the school permits because legally required to do so." *Id.* at 65. And to dispel any doubt, the schools could easily publicize their criticism of the military's policies. *Ibid.*

Neither feature is present here. When Phillips designs and creates a custom wedding cake, there is no clear line between his speech and his clients'. He is not merely tolerating someone else's message on his property; he is giving effect to their message by crafting a unique product with his own two hands. In addition, because Phillips knowingly creates each custom cake for a specific couple and a specific event, observers could reasonably attribute to him a message of neutrality or endorsement. The same could not be said of the law schools in *FAIR*. See 547 U.S. at 62.

Moreover, unlike the law schools in *FAIR* or the shopping center in *PruneYard*, see 447 U.S. at 87, Phillips has no effective way to disavow the message that could reasonably be attributed to him. He cannot realistically display a disclaimer at the actual location where the cake is presented as part of the wedding—a location where people often see his cakes and learn that he has created them. See Pet. App. 280a (noting that

Phillips commonly receives business from individuals who see his cakes at weddings). Nor can he realistically display a disclaimer on the cake itself. To the extent that he can disassociate himself from customers' viewpoints in his store, see *id.* at 35a, that does not affect observers' perception of the expression at the place where it is displayed. And even Phillips's ability to express opposition to same-sex marriage in his store may be limited by Colorado law. See Colo. Rev. Stat. § 24-34-601(2)(a) (prohibiting any written notice indicating that an individual's patronage "is unwelcome, objectionable, unacceptable, or undesirable" because of a protected characteristic). The challenged law's impact on free expression is thus far more significant here than it was in *FAIR*.

Finally, in *FAIR*, the law schools were not required to disseminate any message—either their own or someone else's. See 547 U.S. at 60 (noting that the law does not "require[] them to say anything"). Rather, they were simply required to provide space to military recruiters so that the recruiters could disseminate their own message. See *id.* at 64 (explaining that "the schools are not speaking when they host interviews and recruiting receptions"). At most, the schools were forced to send or post details about recruitment, an obligation "plainly incidental to the [statute's] regulation of conduct." *Id.* at 62. Here, by contrast, Phillips does not simply provide the means for same-sex couples to disseminate their own message about their marriage. Rather, Colorado law requires him both to disseminate his own message and to disseminate the message of his clients. See *Maynard*, 430 U.S. at 717 (government's interest in disseminating message "cannot outweigh an individual's First Amendment right to avoid becoming

the courier for such message"); *Pacific Gas & Elec. Co.*, 475 U.S. at 15 (government cannot force individual or entity "to assist in disseminating [a favored] speaker's message").

2. The application of Colorado's public accommodations law in this case does not satisfy heightened scrutiny

Because the court of appeals concluded that there was no protected expression at stake in this case, it did not address whether the application of Colorado's public accommodations law to petitioners satisfies heightened scrutiny. See Pet. App. 36a. This Court's decision in *Hurley* confirms that it does not.

In *Hurley*, Massachusetts asserted the same interest present here: "ensur[ing] by statute for gays and lesbians desiring to make use of public accommodations * * * that accepting the usual terms of service, they will not be turned away merely on the proprietor's exercise of personal preference." 515 U.S. at 578. The Court held that that interest does not permit a State to compel individuals "to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own." *Ibid.*; cf. *Dale*, 530 U.S. at 657 (noting that the Court had upheld the application of public accommodations laws only when doing so "would not materially interfere with the ideas that the organization sought to express"). Where a law trenches on First Amendment rights in the manner that Colorado's public accommodations law does here, it similarly cannot survive heightened scrutiny. See *Dale*, 530 U.S. at 657-659; see also *Barnette*, 319 U.S. at 642 (striking down regulation that "invade[d] the sphere of intellect

and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control").

That is not to say that every application of a public accommodations law to protected expression will violate the Constitution. In particular, laws targeting race-based discrimination may survive heightened First Amendment scrutiny. As the Court recently observed, "racial bias" is "a familiar and recurring evil" that poses "unique historical, constitutional, and institutional concerns." *Peña-Rodriguez* v. *Colorado*, 137 S. Ct. 855, 868 (2017). As such, "eradicating racial discrimination" in the private sphere is the most "compelling" of interests. *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 604 (1983). A State's "fundamental, overriding interest" in eliminating private racial discrimination—conduct that "violates deeply and widely accepted views of elementary justice"—may justify even those applications of a public accommodations law that infringe on First Amendment freedoms. *Id.* at 592, 604.

The same cannot be said for opposition to same-sex marriage. The Court has not similarly held that classifications based on sexual orientation are subject to strict scrutiny or that eradicating private individuals' opposition to same-sex marriage is a uniquely compelling interest. To the contrary, the Court has recognized that opposition to same-sex marriage "long has been held—and continues to be held—in good faith by reasonable and sincere people," and that "[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises." *Obergefell*, 135 S. Ct. at 2594, 2602; see *id.* at 2607 (emphasizing First Amendment protec-

tions for religious objectors). Indeed, when Phillips declined to create a custom wedding cake for Craig and Mullins in July 2012, Colorado refused to recognize either same-sex marriages or same-sex civil unions. Pet. App. 5a (citing Colo. Const. Art. II, § 31; Colo. Rev. Stat. § 14-2-104(1)(b) (2014)); *id.* at 72a & n.4. In other words, the State itself did not acknowledge the validity of the union it sought to compel petitioners to celebrate. It was not until October 2014, after federal courts had ruled that Colorado's same-sex marriage laws were invalid, that the State began issuing marriage licenses to same-sex couples. See *id.* at 5a & n.1. Especially given that background, the State has not advanced a sufficient state interest to override petitioners' weighty First Amendment interest in declining to create the expression at issue here.[6]

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[6] Because the application of Colorado's public accommodations law to petitioners violates the Free Speech Clause, the United States does not address the parties' arguments regarding the Free Exercise Clause.

CONCLUSION

The judgment of the Court of Appeals of Colorado should be reversed.

Respectfully submitted.

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